United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7321

In The

United States Court of Appeals

For the Second Circuit

B

P/S

GENESEE VALLEY CHAPTER OF THE NATIONAL ORGANIZATION FOR WOMEN and EULA LEE BLOWERS,

Plaintiffs-Appellants,

vs.

ELISHA C. FREEDMAN, individually and as City Manager of the City of Rochester; THOMAS P. RYAN, JR., individually and as Mayor of the City of Rochester; THOMAS GOSNELL, individually and as President of Lawyers Co-operative Publishing Company; LAWYERS CO-OPERATIVE PUBLISHING COMPANY, Inc.,

Defendants-Appellees.

ON APPEAL FROM THE DECISION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

Civil Action No. 74-522

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2

Page

TABLE OF AUTHORITY CITED

FEDERAL STATUTES

FEDERAL REGULATIONS

NEW YORK STATE STATUTES

OTHER REFERENCES

STATEMENT OF THE CASE

On April 30, 1974, defendant Lawyers Co-operative Publishing Company ("LCP") entered into an agreement with the City of Rochester ("City") to display a statue of the mythical god Mercury. Pursuant to that agreement, and at no expense to the City, LCP renovated the statue and constructed a pedestal for its display (R. 263).[1]

On November 7, 1974, the Genesee Valley Chapter of the National Organization for Women and Eula Lee Blowers ("appellants") sought a preliminary injunction halting erection of the statue and the public ceremonies scheduled in conjunction therewith. Appellants further sought a declaratory judgment declaring the contract to be void. Appellants' claim was that the agreement between the City and LCP somehow denied them equal protection of law guaranteed by the Fourteenth Amendment of the United States Constitution, and is void under New York State law. Plaintiffs attempted to support their claims in this action by realleging the identical claims of sex discrimination they had previously alleged in four pending separate actions.[2] As yet, none of

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1 Unless otherwise noted, references are to Appendix to Briefs.

2 Consolidated cases, New York State Division of Human Rights. Blowers et al v. Lawyers Cooperative Publishing Company, Civil Action Number 1973-47; Loughney et al v. Lawyers Cooperative Publishing Company, Civil Action Number 1973-238; Nageotte et al v. Lawyers Cooperative Publishing Company, Civil Action Number 1974-212.

these four actions have been tried. More importantly, at no time has any court, administrative agency or board entered a judgment or made a finding that LCP was guilty of any of appellants' charges (R.266).

Appellants' application for a preliminary injunction was denied by the trial court on November 14, 1974. On November 26, 1975, LCP and Thomas Gosnell ("Gosnell") filed their answer. At the same time, LCP and Gosnell moved for dismissal of the action and for summary judgment. On December 16, 1974, defendants Elisha C. Freedman ("Freedman") and Thomas P. Ryan ("Ryan"), by order to show cause and without answering, sought dismissal of the action and summary judgment. Ryan and Freedman further sought to stay all discovery pending decision. On January 8, 1975, LCP and Gosnell moved to strike interrogatories posed by appellants and for a stay of all discovery pending decision on the motions pending before the court. On April 24, 1975, the Honorable Harold P. Burke, District Judge, granted summary judgment dismissing plaintiffs' complaint. Appellants now appeal Judge Burke's decision.

ARGUMENT

I. APPELLANTS' ACTION IS A REDUNDANT ATTEMPT TO HARASS APPELLEES.

Many months ago, three separate lawsuits (now consolidated) were filed before the United States District

Court for the Western District of New York by appellants and other plaintiffs (supra, p. 1, Footnote 2). Appellants' attorney filed all three suits. Previously, appellants and others had filed identical claims before the New York State Division of Human Rights. These actions included the indentical allegations o sex discrimination set forth in this action. As before, appellants' complaint in this action is prolix, verbose and conclusory. To the extent that appellants sought to litigate their identical claims of employment discrimination in this fifth action, their redundant claims were properly dismissed. Appellants should not be permitted further to harass appellees Gosnell and LCP by litigating identical claims a fourth time before the same court at the same time. See, 5 Wright and Miller, Federal Practice and Procedure; Civil, § 1360, at 640-641 (2nd Ed. 1971).

II. NO LEGALLY SUFFICIENT ISSUES OF FACT EXISTED BETWEEN THE PARTIES.

The Court below correctly found, pursuant to FRCP 56, that this action is a sham and presents no triable issue of fact not already before the Court in Blowers, et. al. v. Lawyers Co-operative Publishing Co. et. al., Civ. 1973-47.

Appellants' brief on appeal repeatedly asserts that issues of fact did continue to exist, thus rendering

summary judgment inappropriate. Appellants ignore the fact that, for purposes of its decision, even if the Court below assumed that appellants' verbose litany of allegations of discrimination were true (R.265), there was no reasonable nexus between appellees' alleged conduct and the statue contract sufficient to establish deprivation of equal protection (R.266).

Appellees do not deny that there are many issues of fact raised by appellants' claims of sex discrimination in employment. These claims are being currently presented in four other actions. However, once those claims are separated out from this lawsuit, all that remains is appellants' obvious attempt to cause appellees unwarranted embarrassment and expense.

Throughout this action, appellants exhibit their typical and continuing confusion between pending litigation and a judgment upon the merits of an action. Appellants would have this Court believe that, since they have filed numerous lawsuits, their claims, ipso facto, are not only meritorious but also that they have already proven their claims by mere allegation. Obviously, appellants' notion is unfounded, and violates the most fundamental tenets of due process.

In point of fact, LCP has not been found to have practiced discrimination in employment. Nonetheless, to buttress their claims, appellants point to the following to establish that LCP, without a trial, has somehow been adjudged guilty of sex discrimination:

(1) The pre-hearing investigation of the New York State Division of Human Rights;

(2) The issuance by the United States Equal Employment Opportunities Commission (EEOC) of a so-called "certificate of general public importance;"

(3) A "Show Cause Order" by the Defense Supply Agency of the Department of Defense.

None of these occurrences support appellants' assumption that LCP has already been found guilty of sex discrimination.

The New York State Division of Human Rights' investigation is simply a pre-hearing prelude which must occur before the New York State Division of Human Rights can hold a hearing on the merits. See, Executive Law, § 297; State Division of Human Rights v. Buffalo Auto Glass Co., Inc., 42 A D 2d 678 (4th Dep't 1973).

The EEOC "certificate of general public importance" likewise contributes no finding of guilt, especially since the EEOC at no time investigated any charges lodged against LCP.

Finally, as indicated in appellants' attorney's affirmation in support of their motion for a preliminary injunction, dated November 11, 1974, the "Show Cause Order" was withdrawn by the Defense Supply Agency (R.94). LCP has never been debarred from federal contracts.

Most importantly, even if LCP had already been found guilty of all that appellants charge, there is no authority to support the assertion that the lease agreement is void as a matter of law.

Even if the lease were a federal contract subject to Executive Order 11246, and even if LCP was found to be in violation of Executive Order 11246, it would be permitted to perform contracts so long as it took action to correct its employment practices, 41 C.F.R. 60-1.31. Appellants apparently fail to appreciate that anti-discrimination laws seek to correct illegal employment practices, not to penalize employers or the City. Nonetheless, appellants seek to penalize LCP, the City and citizens of Rochester by interfering with the lease agreement. Even if, at some

future time, LCP is found "guilty as charged," it will be ordered to correct whatever deficiencies may be found in its employment practices, not its architecture.

In sum, appellants' instant action is without merit since:

(1) There has been no finding of discrimination by any agency, board or court;

(2) Even if there were some finding of discrimination, LCP could continue to perform contracts if it undertook efforts to correct illegal employment practices;

(3) As set forth above, even if LCP were to be found "guilty as charged," it borders on the inconceivable that the lease agreement would be considered relevant enough to LCP's employment practices to warrant interference with the lease.

The Court below found that no City funds had been expended in furtherance of the erection of the statue of Mercury (R.265). Nonetheless, appellants argue that "for purposes of a motion to dismiss, all the plaintiffs' allegations must be taken as true" (Appellants' Brief, p. 26). Appellants ignore FRCP 56(c), which provides in part as follows:

> "... [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Emphasis supplied)

Any assertion that affidavits are insufficient to overcome the allegations set forth in the complaint is without foundation, since:

> "... [A]ffidavits may be used to overcome pleading allegations. This had been the sound rule prior to the 1963 Amendment to subdivision (e), supra; and that amendment settled the matter." 6 Moore's Federal Practice, (2d Ed. 1974) 56.11(3), at 2164.

The affidavit of Elisha C. Freedman, Jr., City Manager of the City of Rochester, based upon personal knowledge, in accordance with FRCP 56(e), derived in his official capacity, stated that: "No public funds have been or will be expended in the repair and public display of the statue of Mercury, nor does the Lease involved herein create any financial obligation of any kind for the City of Rochester" (R.117). Freedman's affidavit was uncontroverted, and is sufficient as a matter of law to show that no public funds were so expended, 6 Moore's Federal Practice, (2d Ed. 1974) 56.11(3), at 2164.

Finding no material issue of fact existing between the parties, the Court below correctly ruled that, as a matter of law, appellants were not entitled to relief.

III. APPELLANTS FAILED TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. § 1983.

An action brought under § 1983, in addition to alleging deprivation of equal protection, must allege that the claimed discrimination significantly involved "state action," Civil Rights Cases, 109 U.S. 3 (1883). Without "state action," even the most invidious forms of discrimination are not actionable under the Fourteenth Amendment, Shelley v. Kraemer, 334 U.S. 1 (1948).

As set forth below, the statue contract is not "state action" sufficient to sustain a claim under 42 U.S.C. § 1983. Further, the City is in no way obligated under any applicable regulations to police the employment practices of LCP.

A. THE CONTRACT BETWEEN THE CITY AND LCP DOES NOT CONSTITUTE "STATE ACTION" UNDER THE FOURTEENTH AMENDMENT.

Appellants apparently argue that any intercourse between a governmental agency and an allegedly discriminatory private entity constitutes "state action" under the Fourteenth Amendment. Appellants' notion was explicitly rejected by the Supreme Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). In Moose Lodge, the Court stated that:

> "... the Court has never held, of course, that discrimination by an otherwise private entity would be violative of the equal protection clause if the private entity receives any sort of service of benefit from the State ... [S]uch a holding would utterly emasculate the distinction between private as distinguishable from state conduct set forth in the Civil Rights Cases, supra, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for discrimination is private, the state must have significantly involved itself in invidious discrimination in order for the discriminatory action to fall within the ambit of constitutional protection." 407 U.S. 163, 173. (Emphasis supplied)

In Moose Lodge, the Supreme Court considered the case of a black man who sought an injunction against a private club whose liquor facilities were licensed and regulated by the State. He also sought to force the State Liquor Board to revoke the club's liquor license. Plaintiff argued that his complaint alleged a Fourteenth Amendment claim because of the following relationships between the State and the club: the club's actions were regulated by the Commonwealth of Pennsylvania; the club enjoyed a partial monopoly of the service of liquor by virtue of the State license; and the club enjoyed a grant of the State's power.

In Moose Lodge, at pages 172-175, the Supreme Court reviewed its own definition of "state action" back to the Civil Rights Cases, 109 U.S. 3 (1883), and in so doing, set forth six tests to ascertain "state action:"

(1) Does the State enforce the complained of privately originated discrimination?

(2) Are the private entity and the State so interdependent that the State has to be recognized as a joint participant in the challenged activity?

(3) If the impetus for the discrimination is private, has the State "significantly involved itself with invidious discrimination"?

(4) Does the State have laws which command the private entity to commit discriminatory conduct?

(5) Are the private entity's profits not only contributions to, but an indispensable element in the financial success of the State or an arm of the State?

(6) Does the complained action of the State grant the private entity a complete monopoly in the area of the complained actions?

Scrutiny of appellants' contentions in light of these six tests compels the conclusion that appellants have failed to allege "state action" within the meaning of the Fourteenth Amendment.

First, appellants did not and could not allege that the City, in any way, enforced the private discrimination alleged in the complaint. Cf. Shelley v. Kraemer, 334 U.S. 1 (1948).

Second, appellants alleged no joint participation by the City in the alleged discriminatory actions. The complaint did not allege that the City had any opportunity to directly control LCP's actions toward LCP employees. Cf. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

Third, it borders on the fanciful to assume that the leasing of the statue condoned, aided or established LCP's right to commit discriminatory acts. To the contrary, appellants fail to suggest how the leasing of the statue has any impact upon LCP employment practices. Cf. Reitman v. Mulkey, 387 U.S. 369 (1967).

Fourth, neither the City of Rochester nor New York State has any ordinances or laws which command defendant to commit discriminatory acts. To the contrary, the State has laws which forbid discrimination (Executive Law, Section 296, et seq.) and an administrative agency which actively enforces such laws, The New York State Division of Human Rights. Cf. Peterson v. City of Greenville, 373 U.S. 244 (1963).

Fifth, appellants did not and cannot allege that the lease of the statue created a financial interdependence or joint participation between the City and LCP necessary to raise appellants' claims to those of constitutional proportion. The Supreme Court's decision in Burton v. Wilmington Parking Authority, supra, established the standard under

which State-private interaction is to be scrutinized. In Burton the degree of interdependence was substantial. The parking garage in which the restaurant was located was publicly owned; the cost of construction was defrayed by City donations and governmental bonds. Further, without the presence of commercial space, the parking garage could not have sustained itself on a pay as it went basis. The Court found this "symbiotic" relationship "indispensible in the success of a governmental agency," 365 U.S. 715, 723-724. The instant case presents no such relationship.

There must be a much greater degree of interdependence or joint participation in the alleged discrimination than is presented by the instant action in order for appellants to invoke the protection of the Fourteenth Amendment. Cases subsequent to Burton, supra, bear this out. For example, in Peterson v. City of Greenville, 373 U.S. 244, 248 (1963), a local ordinance was tantamount to the State having "commanded a particular [discriminatory] result." In Norwood v. Harrison, 413 U.S. 455, 466 (1972), the Fourteenth Amendment was found to be violated because the State, by furnishing textbooks to private school students, had a "significant tendency to facilitate, reinforce and support private discrimination." In Gilmore v. City of Montgomery, 417 U.S. 556 (1974), the Court relied on the "facilitate,

reinforce, and support" language of Norwood to find a violation of the Fourteenth Amendment. The City of Montgomery was found to be facilitating segregated private schools by making available city parks for the use of the segregated schools. Without use of the City's land, the segregated schools could not have offered complete athletic programs. Each case cited represents a direct financial contribution by a governmental entity necessary to the economic existence of the private entity alleged to discriminate.

Comparison of Burton and its progeny to appellants' claims underscores the conclusion that appellants' complaint failed to allege any constitutional claim. The placement of the statue upon LCP's building did not and does not apply City funds to aid alleged discrimination (R.117; 265). To the contrary, the City expended no funds in renovating or placing the statue upon its pedestal (R.117). Moreover, as the lease agreement makes clear (R.31-35), the City will not realize any income from LCP's use of the statue, nor is the City under any financial obligation to support the project. There is a complete absence of the financial interdependence upon which the Supreme Court founded its decision in Burton.

In short, even if appellants were entirely correct in their allegations of discrimination, the lease by the

City of the statue is not the type of involvement in the alleged discriminatory activity which the Supreme Court has recognized as creating a constitutional question. Burton v. Wilmington Parking Authority, supra; Gilmore v. City of Montgomery, supra; Moose Lodge No. 107 v. Irvis, supra; Norwood v. Harrison, supra; Peterson v. City of Greenville, supra.

Sixth, the State has not granted LCP any monopoly, much less one on employment. This action is founded upon allegations of discrimination in employment. It is not and cannot be shown that LCP has any monopoly on employment. Cf. Lavoie v. Bigwood, 457 F.2d 7 (1st Cir. 1972); Ihrke v. Northern State Power Company, 459 F.2d 566 (8th Cir. 1972); Palmer v. Columbia Gas of Ohio, Inc., 479 F.2d 153 (6th Cir. 1973). [In fact, even a complete monopoly may not be "state action." See, Lucas v. Wisconsin Electric Power Company, 466 F.2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 1114 (1973); Jackson v. Metropolitan Edison Company, 483 F.2d 754 (3rd Cir. 1973)].

In short, appellants have wholly failed to establish the significant interaction between the City and LCP necessary to establish a claim under the Fourteenth Amendment. Absent the presence of such significant "state

action," purely private activities are not subject to challenge under the Equal Protection clause, Moose Lodge, supra; Shelley v. Kraemer, supra.

B. THE CITY IS NOT OBLIGATED UNDER APPLICABLE FEDERAL REGULATIONS TO POLICE THE EMPLOYMENT PRACTICES OF LCP.

Appellants allege that the statue contract violates Title VII of the Civil Rights Act of 1964 ("Title VII"), the regulations of the Law Enforcement Assistance Administration ("LEAA"), 28 CFR 4].201, et seq., and regulations promulgated under the State and Local Fiscal Assistance Act of 1972 ("Revenue Sharing"), 31 CFR 51.32. Neither Title VII, LEAA regulations nor Revenue Sharing has any application to the statue contract. Title VII simply does not mention the type of agreement at issue herein. It relates only to employment practices, not statues or public works. Title VII does not require the City to police employment practices other than its own. Moreover, no LEAA or Revenue Sharing funds allocated to the City were used by LCP or the City to erect the statue of Mercury. Appellants' claim upon those grounds must also fail. (See affidavit of Elisha C. Freedman, dated November 12, 1974 (R.117)). Absent expenditure of federal funds, there is no statutory requirement or authority for City interference in private sector employment.

Moreover, even if the City were obligated by virtue of the statue contract to police private employment practices, appellants cite no authority to support the proposition that failure to do so renders the contract void.

IV. PLAINTIFFS FAILED TO STATE A CAUSE OF ACTION UNDER 42 U.S.C. § 1985(3).

Appellants allege that appellees Gosnell and LCP engaged in a conspiracy to deny appellants' equal protection of the laws, and are therefore liable to appellants under 42 U.S.C. § 1985(3).

To sustain an action under 42 U.S.C. § 1985(3), appellants must establish both the existence of a conspiracy and the existence of "state action" in furtherance of the conspiracy, Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972). Appellants have not and cannot establish either contention.

A. ACTIVITY OF A SINGLE BUSINESS ENTITY, EVEN THOUGH INVOLVING DECISIONS OF TWO OR MORE EMPLOYEES, DOES NOT CONSTITUTE A CONSPIRACY.

It is well established that the acts of a corporation's agent are the acts of the corporation, Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir.

1952), cert. denied 345 U.S. 925 (1952). Moreover, the acts of the agent cannot be used to establish a conspiracy between the corporation and the agent. Such acts are treated as the acts of a single entity, Nelson Radio & Supply Co. v. Motorola Inc., 200 F.2d 911, 914; Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972).

The Eighth Circuit, on facts similar to those herein, dealt directly with the issue of an alleged conspiracy between a corporation and its agents under 42 U.S.C. § 1985(3). In Baker v. Stuart Broadcasting Co., 505 F.2d 181 (8th Cir. 1974), plaintiff alleged that a conspiracy existed between defendant corporation and its officers and stockholders (also named defendants) to deprive plaintiff of employment on the grounds of her sex. The Court, relying upon the Seventh Circuit decision in Dombrowski v. Dowling, supra, and quoting therefrom, stated:

> "We ... believe that the statutory requirement that 'two or more persons ... conspire or go in disguise upon the highway,' is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm.
>
> * * * *
>
> "... (I)f the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute." 505 F.2d 181, 183.

The allegations in this case are identical.

Appellants allege in this action that Gosnell (President of LCP) and LCP conspired to deprive them of equal protection rights because of their sex. Even if appellants' allegations of discriminatory activity were true, the decisions made in furtherance thereof are the acts of a single entity. One may not be found to have conspired with oneself, Morrison v. California, 291 U.S. 82, 92 (1933).

In accord with the reasoning of the Seventh and Eighth Circuits, the claims under § 1985(3) were properly dismissed.

B. APPELLANTS FAILED TO ESTABLISH "STATE ACTION" SUFFICIENT TO SUSTAIN A CAUSE OF ACTION UNDER 42 U.S.C. § 1985(3).

Not only have appellants failed to establish the necessary elements of a conspiracy requisite to an action under 42 U.S.C. § 1985(3), but appellants have likewise failed to establish the second element necessary to making out a cause of action under 42 U.S.C. § 1985(3), that of "state action."

Appellants rely upon Griffin v. Breckenridge, 403 U.S. 88 (1971), for the proposition that "state action" is not an element of a cause of action under 42 U.S.C. 1985(3). However, Griffin is distinguishable from the facts of this case.

Griffin dealt with an assault by a group of whites on black plaintiffs. The group of whites blocked the highway, stopped plaintiffs' automobile, and then assaulted them. No "state action" was alleged. Plaintiffs asserted their claims under 42 U.S.C. § 1985(3), which states in pertinent part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ... in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

The plain language of the statute would lead to the conclusion that "state action" need not be present. However, in considering Griffin, the Court was confronted with its earlier decision in Collins v. Hardyman, 341 U.S. 651 (1951), which had construed § 1985(3) to require "state action." The Court in Griffin found that the constitutional issues perceived by the Court in Collins v. Hardyman, supra,

no longer existed, 403 U.S. 88, 96. The Court went on to hold that § 1985(3) does in fact reach wholly private conspiracies, 403 U.S. 88, 102.

In so holding, however, the Court did not extend § 1985(3) to encompass any and all private conspiracies resulting in a denial of equal enjoyment of rights. The Court in Griffin explicitly limited its decision to discrimination arising out of racial bias.

> "We need not decide given the facts of this case whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us." (Emphasis supplied; citation omitted) 403 U.S. 88, 102, n. 9.

The Court's narrow holding stemmed from a need to identify "a source of Congressional power to reach the private conspiracy alleged..." 403 U.S. 88, 104. The Court found such a source in the Thirteenth Amendment and the federally protected right to travel interstate, 403 U.S. 88, 104-106.

Subsequent to the Griffin decision, the Seventh Circuit considered the parameters of the Supreme Court's decision. In Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972), the Court reviewed allegations by plaintiff that a landlord's denial of rental of office space denied him enjoyment of equal rights. Plaintiff argued that the

refusal to rent stemmed from the fact that, although he was white, a substantial portion of his clients were of black or latin origin. Plaintiff further alleged that the decision of the landlord and its agents constituted a conspiracy and was therefore actionable under § 1985(3). Plaintiff contended that, in light of Griffin, he need not allege "state action." The Court firmly rejected this contention. The Court stated that although, in light of the narrow holding of Griffin, "some purely private conspiracies are proscribed by § 1985(3), Griffin did not purport to delineate the scope of the rights secured by the statute," Dombrowksi v. Dowling, 459 F.2d 190, 194.

The Court in Dombrowski found that Griffin gives express recognition to three categories of protected rights, which, if abridged, are actionable under § 1985(3): First, a black citizen's rights under the Thirteenth Amendment; second, a federal right to travel interstate; and, third, rights protected by the Fourteenth Amendment.

Each category enunciated has a particular constitutional basis for congressional action. The Thirteenth Amendment, § 2, authorizes Congress to enact such laws as are necessary to effect removal of all badges of slavery. Pursuant to § 2, Congress may intervene in otherwise solely private areas, Civil Rights Cases, 109 U.S. 3, 20; Griffin

v. Breckenridge, 403 U.S. 88, 104. The federally guaranteed right to travel interstate is well established. Congress has long been recognized to possess ample authority to protect this right, even in the private sector, Griffin v. Breckenridge, 403 U.S. 88, 105. Congress may likewise enact legislation to guarantee the rights granted under the Fourteenth Amendment. However, by definition, the Fourteenth Amendment extends only to denial of equal protection under "color of state law," U.S. v. Cruikshank, 92 U.S. 542 (1875); Civil Rights Cases, supra.

Since Griffin was decided solely upon Thirteenth Amendment guarantees and the right to travel interstate, the Court in Dombrowski concluded that:

> "Since plaintiff is white and claims no abridgement of his constitutional right to travel, the holding of Griffin does not control this case." 459 F.2d 190, 195.

Having failed to establish either a federally guaranteed right under the Thirteenth Amendment or a federally protected right to travel interstate, plaintiff could rely only upon Fourteenth Amendment claims.

> "Since the Fourteenth Amendment, unlike the Thirteenth, affords the plaintiff no protection against discrimination in which there is no state involvement of any kind, a private conspiracy which arbitrarily denies him access to private property does not abridge his Fourteenth Amendment rights. We therefore conclude that an arbitrary business discrimination ... does not deprive plaintiff of

> "equal protection of the laws" within the meaning of § 1985(3) if there is no state involvement whatsoever in the discrimination." 459 F.2d 190, 196.

The same conclusion is appropriate on similar facts in this case. Appellants, who are all white, failing to allege racial bias or interference with a federal right to travel interstate, must rely upon the Fourteenth Amendment as a basis for interference in private activity under § 1985(3). A showing of "state action" is required under the Fourteenth Amendment. As set forth above, appellants failed to establish any "state action" sufficient as a matter of law under the Fourteenth Amendment.

Appellants failed to establish either element of a cause of action under § 1985(3). Appellants failed to allege "state action" or facts constituting a conspiracy, and therefore failed to state a cause of action. The Court below properly granted summary judgment to appellees.

V. ABSENT A FEDERAL CAUSE OF ACTION, THE COURT BELOW PROPERLY DISMISSED ALL STATE LAW CLAIMS FOR LACK OF PENDENT JURISDICTION.

Since appellants' action was dismissed by summary judgment, the Court below lacked jurisdiction over pendent claims founded entirely upon State law.

As the Supreme Court said in United Mine Workers v. Gibbs, 383 U.S. 715 (1966), "Certainly, if the Federal

claims are dismissed before the trial, even though not insubstantial in a jurisdictional sense, the State claims should be dismissed as well," 383 U.S. 715, 726.

Even if appellants may have a substantial claim under State law that would affect the validity of the statue contract, any State claim must be brought in State Court. Appellants' claim could not be brought in federal court, since the court has no jurisdiction of that claim, United Mine Workers v. Gibbs, supra; Siding v. Anaston, 266 F. Supp. 1015 (N.D. Ill. 1967).

VI. THE COURT BELOW PROPERLY DENIED APPELLANTS' MOTION FOR A PRELIMINARY INJUNCTION.

Appellants contend upon appeal that the Court below erred in denying their motion for a preliminary injunction. However, appellants failed to establish in the Court below any likelihood of success on the merits, irreparable harm, a balancing of hardship weighing in their favor, or that the public interest would be served by injunctive relief. Appellants further contend that denial of the preliminary injunction, absent an evidentiary hearing, justifies reversal.

A. APPELLANTS FAILED TO DEMONSTRATE ANY LIKELIHOOD OF PREVAILING ON THE MERITS; IRREPARABLE HARM; THAT A CAREFUL BALANCING OF HARDSHIPS WEIGHED IN APPELLANTS' FAVOR; OR THAT THE PUBLIC INTEREST WOULD BE SERVED BY THE INJUNCTION.

A motion for a preliminary injunction pursuant to FRCP 65 is addressed to the sound discretion of the court, U.S. v. Corrick, 298 U.S. 435 (1935). In exercising its discretion, the court is guided by four considerations of equity. These considerations require the moving party to demonstrate a likelihood of prevailing on the merits; irreparable harm; a balancing of hardships weighing in movant's favor; and that the public interest will be served by the injunction, 7 Moore's Federal Practice (2nd Ed. 1974) 65.04(1), at 65-39 - 65-47.

As demonstrated before the Court below, and amply set forth in foregoing sections of this brief, appellants clearly failed to establish any likelihood of prevailing on the merits. The litany of unproven allegations, repeatedly and exhaustively set forth by appellants, do not constitute any showing whatsoever. Appellants' contention that LCP's discrimination is a "matter of record" (Appellants' Brief, p. 24) is a conscious misrepresentation. What is a matter of record are unproven, unadjudicated allegations, and nothing more!

More importantly, however, appellants stated no viable cause of action. It was therefore impossible to demonstrate any probable outcome save dismissal.

Irreparable harm to the appellant could not be shown. Appellants could do nothing more than assert a paranoic fear of harm based upon the fact that LCP and the City had entered into a contract to display the statue. The harm alleged by appellants is fanciful and hardly irreparable. Had the Court later found the contract to be illegal, the statue was and is removable. Therefore, even if the speculative harm did in fact exist, there was no threat that such harm was irreparable.

A balancing of hardships weighs undeniably in favor of LCP and the City. Appellants conveniently gloss over the substantial expenditures by LCP in preparation for the ceremonies concomitant to erection of the statue. Pre-ceremony expenditures totalled approximately $7,000, and the cost of the reception and ceremonies an additional $9,000 (R.264). Such sums are no insignificant, and such a loss would represent a real as opposed to psychic hardship.

Further, the public interest was clearly served by erection of the statue. LCP undertook to perform an act of civic commitment in erecting the landmark statue. Since its removal in 1951, repeated efforts had been undertaken to

restore Mercury to the Rochester skyline. Such efforts were unsuccessful largely due to the costs involved. The cost of erection was not insubstantial. In fact, LCP expended $121,500 in refurbishing and erecting the statue solely at its own expense (R.119).

Failing to sustain any element necessary to justify a preliminary injunction, appellant's motion was properly denied.

B. THE COURT BELOW DID NOT COMMIT REVERSIBLE ERROR BY DENYING APPELLANTS' MOTION BASED UPON PLEADINGS AND AFFIDAVITS BEFORE THE COURT.

The Court below dismissed appellants' motion on the pleadings, affidavits and briefs submitted by the parties.

This Court has in the past expressed preference for an evidentiary hearing prior to determination of a motion for a preliminary injunction, SEC v. Frank, 388 F.2d 486 (2nd Cir. 1968). See, also, SEC v. Great American Industries, Inc., 407 F.2d 453 (2nd Cir. 1968), cert. denied 395 U.S. 920 (1969). However, this Court has not held an evidentiary hearing to be mandatory, nor the lack thereof error per se. Further, in light of the proper dismissal of the action and grant of summary judgment in favor of appellees, refusal to hold a pointless hearing was entirely reasonable.

An evidentiary hearing is required only where factual disputes exist which require resolution necessary to establish the likelihood of prevailing on the merits, Dopp v. Franklin National Bank, 461 F.2d 873 (2nd Cir. 1972). In the instant case, no legally sufficient issues of fact existed. Appellants' complaint was defective as a matter of law, and was properly dismissed by the Court below.

Assuming that issues of fact were outstanding, a denial of a preliminary injunction without an evidentiary hearing is not error per se. Such a denial merely broadens the scope of the appellate court's review. Rather than undertaking a narrow review appropriate where there has been an exercise of judicial discretion below, this Court has taken the position that it will review all matters in evidence de novo in reaching a determination on the propriety of the decision below, Dopp v. Franklin National Bank, 461 F.2d 873, 878-879.

The decision of the Court below is fully supported by the record before this Court. Appellants failed to sustain even one of the four requirements necessary to justify injunctive relief.

VII THE MOTIONS OF RYAN AND FREEDMAN FOR DISMISSAL AND FOR SUMMARY JUDGMENT WERE PROPERLY ENTERTAINED BY THE COURT BELOW

Appellants assert that the failure of defendants Ryan and Freedman to interpose an answer nullified their motion to stay discovery, to dismiss and for summary judgment.

A pre-pleading motion pursuant to FRCP 12 tolls the time to answer, 6 Moore's Federal Practice (2nd Ed. 1974) 56.08, n.18, at 2104. Even though, at the time of the motion, the time to answer had elapsed, appellants had not acted to secure entry of default pursuant to FRCP 55(a). Such failure can fairly be construed as a waiver of their objections. Further, FRCP 55(c) vests in the trial court the discretion to relieve any default upon motion by a defaulting defendant. The consideration by the Court below of the motion by Freedman and Ryan implies an exercise of such discretion. Therefore, even though Ryan and Freedman failed to move for the specific relief, such a hypertechnical error can only be described as harmless and without bearing on the validity of the decision below.

CONCLUSION

For the foregoing reasons, appellees LCP and Gosnell respectfully submit that the decisions of the Court below denying appellants' motion for a preliminary injunction, and granting appellees' motion to dismiss for failure

to state a cause of action and for summary judgment, were in all respects proper. The decisions below should be affirmed.

Dated: October 1, 1975

Respectfully submitted,

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Johnson D. Hay/Publisher
Russell D. Hay/Board Chairman

The Daily Record

October 2, 1975

Re: Genesee Valley Chapter of the National Organization for Women and Eula Lee Blowers vs Elisha C. Freedman et al

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Nixon, Hargrave, Devans and Doyle

Attorney(s) for

Defendants-Appellees

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix of the above entitled case addressed to:

Ms. Emmelyn Logan-Baldwin, Esq.
510 Powers Building
Rochester, NY 14614

☐ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

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.....Johnson D. Hay.....

Sworn to before me this 2nd day of October, 1975

.....John D. Ward.....
~~Notary Public~~
Commissioner of Deeds